

3. Defendant Descon 4S, LLC (“TD 4S”) is a limited liability company organized and existing under the laws of the State of Texas, with its principal place of business 5801 N. 10th Street, Suite 500, McAllen, Texas 78504. TD 4S is a citizen of the State of Texas for purposes of 28 U.S.C. § 1332(a) and may be served with process through its managing member, Michael D. Smith, at 5006 W. Chapin Road, Edinburg, Texas 78451.

4. Defendant Michael D. Smith (“Smith”) is a citizen of the State of Texas, who may be served with process at 5006 W. Chapin Road, Edinburg, Texas 78451.

II. JURISDICTION AND VENUE

5. This Court possesses original jurisdiction over GCNA’s claims under 28 U.S.C. § 1332(a) because the matter in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs, and the matter in controversy is between citizens of different states.

6. This Court possesses the power to declare the respective rights and other legal relations of the parties as requested herein under 28 U.S.C. § 2201(a).

7. This Court possesses the power to grant the injunctive relief requested herein under rule 65 of the Federal Rules of Civil Procedure.

8. Venue is proper in the United States District Court for the Southern District of Texas, McAllen Division, under 28 U.S.C. § 124(d)(4) and 28 U.S.C. § 1391(b)(1) because one or more of the Defendants reside in the Southern District of Texas, McAllen Division, and all of the Defendants are residents/citizens of the State of Texas.

III. FACTUAL ALLEGATIONS

A. The General Agreement of Indemnity

9. On or about June 6, 2014, Texas Descon, TD 4S, and Michael D. Smith (collectively, the “Indemnitors”) executed the General Agreement of Indemnity on behalf of

GCNA (the "Indemnity Agreement"). A true and correct copy of the Indemnity Agreement is attached hereto as **Exhibit 1** and incorporated herein for all purposes.

10. The Indemnity Agreement defines "Bond" as [a]ny and all bonds, undertakings, contracts of suretyship, guaranties or indemnity, issued on behalf of the Principal and signed by the Surety or Additional Sureties, or by the Surety or Additional Sureties or any co-sureties, or procured for the Principal by the Surety or Additional Sureties, whether such bonds, undertakings, contracts of suretyship, guaranties or indemnity are executed before or after this Agreement."

11. The Indemnity Agreement defines "Contract" as "[a]ny agreement between or among Principal and any one or more parties other than the Surety, together with all associated documents, including but not limited to general and special conditions, specifications, drawings, schedules, and/or CPMs, whether or not the Surety has executed or procured the execution of any Bond in connection therewith" (the "Contract").

12. The Indemnity Agreement defines "Event of Default" to include, among other things, the following:

3. Any abandonment, forfeiture, breach, failure, refusal, or inability, whether actual or alleged, to perform any Contract, or any obligation contained therein.

4. Fails to pay, to the extent due in whole or in part, claims, bills or other indebtedness incurred in connection with the performance of any Contract. . . .

10. Receipt of any information by the Surety or the existence of any facts relating to the financial condition of any Principal or Indemnitor which causes the Surety, in its sole and absolute discretion, to believe that such Principal or Indemnitor may be unable to perform or meet any of their obligations under this Agreement.

11. Breaches, fails to perform, or comply with, any provision of this Agreement.

13. With respect to duty of the Indemnitors to exonerate, indemnify, and save GCNA harmless, the Indemnity Agreement, entitled "Indemnity to Surety," provides:

1. All loss, costs, and expenses of whatsoever kind or nature, including court costs, attorney fees (whether Surety at its sole option elects to employ its own attorney, or permits or requires Indemnitors to make arrangements for Surety's

legal representation), in-house fees, consultant fees, investigative costs and any other losses, costs or expenses incurred by the Surety by reason of:

- a. Surety having executed, provided, or procured any Bond;
 - b. any Default under this Agreement by any of the Indemnitors;
 - c. Surety enforcing any covenants or conditions of this Agreement;
 - d. Surety conducting any investigation, obtaining or attempting to obtain a release, or recovering or attempting to recover loss or unpaid premium in connection with any Bonds; and/or
 - e. Surety prosecuting or defending any action or claim in connection with any Bonds provided or procured on behalf of the Principal or Indemnitors, whether Surety at its sole option elects to employ its own counsel, or permits or requires Indemnitors to make arrangements for Surety's legal representation. In addition, the Indemnitors agree to pay Surety interest on all disbursements made by Surety in connection with loss, costs and expenses incurred by Surety at the maximum rate permitted by law calculated from the date of each disbursement.
2. Any amount sufficient to discharge any claim made against Surety on any Bond, whether Surety will have made any payment or established any reserve therefor. Such payment shall be equal to the larger of (a) the amount of any reserve set by the Surety, or (b) such amount as the Surety, in its sole judgment, shall deem is sufficient to protect it from loss. This sum may be used by Surety to pay such claim or be held by Surety as collateral security against loss on any Bond. Surety shall have no obligation to invest or provide a return on the funds deposited. The Indemnitors acknowledge that their failure to pay, immediately on demand, that sum demanded by Surety will cause irreparable harm for which Surety has no adequate remedy at law. The Indemnitors confirm and acknowledge that Surety is entitled to injunctive relief for specific enforcement of the foregoing provision.

14. With respect to the right of GCNA, in addition to Paragraph 12 above, in its sole discretion, to settle any claim submitted against any Bond, the Indemnity Agreement provides that "Surety shall have the exclusive right for it and the Indemnitors to determine in its sole and absolute discretion whether any claim or suit upon any bond shall, on the basis of belief on liability, expediency or otherwise, be paid, compromised, defended, or appealed."

15. With respect to the duty of the Indemnitors to collateralize GCNA, the Indemnity Agreement, under the section entitled "Security to Surety," provides, in pertinent part,

As collateral security to Surety for the agreement of the Indemnitors to repay all loss and expense to Surety, whether heretofore or hereafter incurred, the Indemnitors

1. Assign to Surety and grant a security interest to Surety in all rights of the Indemnitors in, or in any manner growing out of:

- a. all rights of the Indemnitors in all contracts referred to in the Bonds, or secured by the Bonds and all money or property due or to become due Indemnitors arising out of or in any way relating to contracts performed by Indemnitors, whether secured by Bonds executed by Surety or not, including, but not limited to, accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof;
- b. all rights of the Indemnitors in all contracts, including, but not limited, unbonded contracts or contracts bonded by another surety, and all money or property due or to become due Indemnitors arising out of or in any way relating to such contracts, including, but not limited to, accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof; . .
- d. all money, cash, cash equivalents, bank accounts, deposit accounts (checking or savings), certificates of deposit, securities, bonds, negotiable instruments, instruments (including promissory notes), letter of credit rights, and all other investment property; . . .
- l. all limited partnership and general partnership interest.

16. The "Security to Surety" section of the Indemnity Agreement also imposes a trust on contract funds received by the Indemnitors as follows:

4. Agree that with respect to each specific contract secured by Bond executed, provided or procured by Surety on Principal's behalf, all money and property representing the consideration for the performance of the contract, (including, without limitation, the proceeds of claims for adjustments, additional compensation, compensation for the delay, extra work, change orders, insurance claims and all damage claims) whether in the possession of the Principal, Indemnitors or others and whether earned, unearned, paid, retained or to be paid shall be held in trust as trust funds for and shall be used solely for:

- a. the performance of the contract;
- b. the payment of obligations to subcontractors, laborers, and suppliers of materials and services incurred or to be incurred in the performance of the contract for which Surety is or may be liable under Bonds and;
- c. the satisfaction of Indemnitors' obligations to Surety under this Agreement and all other indebtedness and liabilities of Indemnitors to Surety.

17. With respect to duty of the Indemnitors to provide GCNA free access to their books, records, and related financial information, the Indemnity Agreement provides, in pertinent part, the following:

Until Surety shall have been furnished with the competent evidence of its discharge, without loss from any Bonds, Surety shall have the right to free access at reasonable times to the books, records and accounts of each of the Indemnitors for the purpose of examining, copying, or reproducing them. Each one of the Indemnitors hereby authorizes any depositories in which funds of any of the Indemnitors may be deposited to furnish to Surety the amount of such deposits as of any date requested, and any legal entity doing business with the Indemnitors is authorized to furnish any information requested by Surety concerning any transaction.

B. GCNA's Anticipated Loss

18. In reliance upon its rights under the Indemnity Agreement, GCNA issued construction surety bonds on behalf of and/or at the request of Texas Descon for two projects in the State of Texas. GCNA issued Performance Bond No. SS70111645 and Payment Bond No. SS70111645 with Texas Descon as the Principal and the City of San Juan (the "City") as the Obligee (the "San Juan Bonds") for the 3.5 MGD Water Treatment Plant No. 2 Expansion and Rehabilitation of Existing 3.5 MGD Plant Project located in San Juan, Texas (the "San Juan Project"). GCNA also issued Performance Bond No. SS70111644 and Payment Bond No. SS70111644 with Texas Descon as the Principal and the San Diego Independent School District (the "District") as the Obligee (the "San Diego Bonds") for the New Bernarda Jaime Junior High School project located in San Diego, Texas (the "San Diego Project").

19. GCNA started receiving claims from subcontractors and suppliers of Texas Descon against the payment bonds issued on the San Juan and San Diego projects. The claims began to escalate in May and June 2015 prompting GCNA to schedule a meeting with representatives of Texas Descon during the week of June 8, 2015. GCNA requested the meeting for the purpose of investigating the financial ability of Texas Descon to complete the San Juan and San Diego

projects as well as determining how Texas Descon intended to resolve the pending payment bond claims. The meeting concluded with Texas Descon agreeing to provide GCNA with cost to complete calculations for the San Juan and San Diego projects as well as an updated accounts payable report showing how Texas Descon applied over \$500,000 in payments recently received from the District. As of June 19, 2015, Texas Descon had not provided GCNA with the cost to complete and accounts payable information it had promised to produce. GCNA informed Texas Descon on that same date that it would have to escrow the bonded contract funds if Texas Descon did not produce the requested financial information.

20. With Texas Descon not providing the requested information to GCNA by June 22, 2015, GCNA notified Texas Descon on June 22 that “[c]laims continue to increase and we are not receiving responses to our requests for information. I need an immediate report regarding the distribution of the funds recently received from San Diego ISD. I also need your plan for the disbursement of funds associated with pay app #4 on the Wastewater Treatment Plant. . .” GCNA also advised Texas Descon that it would send out letters of direction to the City and the District and go forward under funds control if it did not receive the requested information.

21. Texas Descon responded to GCNA by electronic mail from Smith on June 23, 2015.

Smith wrote:

Please see attached Cost to Complete. I revised them based on cost to complete accounting for Subcontracts, Vendors PO's, Retainage, and adjusted for Change Orders not applied to Subcontractor Commitments. The other change was the Value Engineering Cost coming off San Diego and I had full contingency's in the first set I sent you. I'm being conservative on completion cost, and I have my V.P. in San Antonio checking the San Diego VE also for me as it still has approximately 400,000 in my cost that is not part of the project now. He will finish by noon today; which should lower my CTC on San Diego.

As for the Application No: 4 which was certified for 577,022 disbursements are as follows:

CBI	193,917.80
Briggs	2,658.79
CDB Masonry	98,688.00
Dynamic Pumps	57,000.00
American Door	2,630.00
EMI	104,652.95
SCI	105,333.85
	564,881.39

For the San Diego Application, My mother is running the Job Cost Detailed Report and Highlighting the all cost disbursed with the April Application. This will be emailed from her this morning.

I'll call you this morning to discuss as For the Cash Borrow Analysis I'm \$767,356 to your \$709,792. The one I'm having Ty in San Antonio check my numbers. He was the person in charge of the buyout and Value Engineering which was substantial with me, and I'm at <355,503> to your <473,215>; however, in verifying committed cost in Timberline I saw several cost that were VE'd out which would improve the deficit showing now.

22. Through the June 23, 2015 communication to GCNA, Texas Descon committed to using the anticipated payment of \$577,022 in contract funds from the District to pay \$564,881.39 to the subcontractors and suppliers of Texas Descon. During the week of July 13, 2015, Texas Descon produced an updated accounts payable ledger to GCNA. The ledger showed that Texas Descon had not paid any of the subcontractors and suppliers listed in the June 23 communication from Smith.

23. On July 17, 2015, GCNA issued a letter to the Indemnitors pursuant to its rights under the Indemnity Agreement demanding that they "post collateral in the amount of \$580,000 to be held by the Guarantee as security for, and/or to reimburse the Guarantee for any and all loss, cost and expense, including, but not limited to, professional and consulting fees and interest incurred by The Guarantee in connection with the issuance of said Bonds to the referenced Principals. The Guarantee further demands that the \$580,000 in collateral be forwarded to The

Guarantee on or before Friday, July 24, 2105.” A true and correct copy of the letter dated July 17, 2015 is attached hereto as **Exhibit 2** and incorporated herein for all purposes.

24. On July 20, 2015, GCNA requested Texas Descon to confirm whether it had paid any of those subcontractors and suppliers listed by Smith in his June 23 communication and, if not, what it did with the \$577,022 it received from the District. GCNA did receive confirmation that same day from the District that it had in fact released the \$577,022 to Texas Descon.

25. Texas Descon failed and/or refused to respond to the July 17 collateral demand of GCNA by the July 24 deadline imposed by GCNA. Texas Descon also failed and/or refused to inform GCNA what it did with any of the contract proceeds received by Texas Descon from the City and the District. GCNA issued a second letter to the Indemnitors on July 24, 2015 for the purpose of putting them on notice that the failure of Texas Descon to use contract proceeds to pay its subcontractors and suppliers constitutes a breach of the Indemnity Agreement as well as a violation of the Texas Construction Trust Fund Act and the Texas Prompt Payment Act. The letter also notified the Indemnitors that GCNA would do what it deemed necessary to mitigate potential loss on the bonded projects including, among other things, exercising its rights under the Power of Attorney provision of the Indemnity Agreement to voluntarily default Texas Descon on the San Diego and San Juan projects so that GCNA could facilitate the completion of both projects. A true and correct copy of the July 24, 2015 letter is attached hereto as **Exhibit 3** and incorporated herein by reference.

26. As of the date of this Complaint, GCNA had received payment bond claims on the San Diego Project in the amount of \$1,081,303.91 and payment bond claims on the San Juan Project in the amount of \$161,194.13. With Texas Descon failing to use contract proceeds from the City and the District to pay its subcontractors and suppliers, GCNA anticipates that it will

receive additional claims against the payment bonds and potentially claims against the performance bonds with the financial uncertainty of Texas Descon. In an effort to protect the GCNA from its current exposure under the payment bonds, it now requires the Indemnitors to post collateral in the minimum amount of \$1,250,000.

27. Because the Indemnitors refuse to (a) post collateral security to GCNA, or (b) provide a plan of action for indemnifying GCNA, GCNA will face imminent harm, irreparable injury, and will have no adequate remedy at law with respect to reimbursement for its loss under the Bonds.

28. All conditions precedent to recovery by GCNA from the Indemnitors have occurred or have been performed.

CLAIMS FOR RELIEF

COUNT I

Specific Performance of Collateral Obligations of the Indemnitors

29. GCNA hereby restates the averments contained in the foregoing Paragraphs of its Complaint for Indemnity, Equitable, and Other Relief as if fully set forth herein.

30. Under the *Indemnity to Surety* provision of the Indemnity Agreement, the Indemnitors are obligated to deposit collateral with GCNA for GCNA to remedy the defaults of the Indemnitors under the Indemnity Agreement.

31. Pursuant to the Indemnity Agreement, GCNA has demanded that the Indemnitors deposit collateral relative to the claims asserted against the payment bonds issued by GCNA on the San Diego and San Juan projects. The minimum amount of collateral currently required by GCNA at this time is \$1,250,000.

32. Despite GCNA's demand, the Indemnitors have failed and refused to deposit any collateral with GCNA.

33. The failure of the Indemnitors to deposit the demanded collateral with GCNA constitutes a breach of the Indemnity Agreement and constitutes an Event of Default under the Indemnity Agreement.

34. GCNA is therefore entitled to the entry of a judgment compelling the Indemnitors to specifically perform their duty to deposit collateral with GCNA in the minimum amount of \$1,250,000.

COUNT II

Request for Preliminary Injunction

35. GCNA hereby restates the averments contained in the foregoing Paragraphs of its Complaint for Indemnity, Equitable, and Other Relief as if fully set forth herein.

36. GCNA hereby requests a Preliminary Injunction (a) ordering the Indemnitors to deposit immediately cash collateral in the minimum amount of \$1,250,000 with GCNA and (b) ordering the Indemnitors to provide the Surety immediate access to their books, records, accounts, databases, and other documents and information GCNA has a right to access under the Indemnity Agreement (collectively, the "Records"). The injunctive relief is necessary to preserve the status quo and to prevent significant, imminent, and irreparable harm to GCNA, as GCNA will suffer such harm if it does not receive the protection it has a right to receive under the Indemnity Agreement in the form of cash collateral.

37. GCNA will also suffer immediate and irreparable injury if the Indemnitors are not immediately restrained from destroying and/or hiding the Records, and the Indemnitors have a contractual obligation to provide access to the Records. No harm will occur to the Indemnitors if

this Court orders them to abide by their contractual obligation and provide reasonable access to GCNA.

38. GCNA will likely prevail on the merits and has no adequate remedy at law. Injunctive relief will not adversely affect the public interest, and GCNA is willing to post a bond in the amount the Court deems appropriate.

COUNT III

Contractual Indemnity Relative to the Bond Claims

39. GCNA hereby restates the averments contained in the foregoing Paragraphs of its Complaint for Indemnity, Equitable, and Other Relief as if fully set forth herein.

40. Under the *Indemnity to Surety* section of the Indemnity Agreement, the Indemnitors are obligated to indemnify GCNA from and against all loss, costs, and expenses incurred by GCNA.

41. The Indemnitors failed to indemnify and save GCNA harmless from and against all loss.

42. The failure of the Indemnitors to indemnify and save GCNA harmless from and against all loss constitutes a breach of the Indemnity Agreement and an Event of Default under the Indemnity Agreement.

43. The breach of the Indemnity Agreement by the Indemnitors has damaged GCNA in an amount in an amount likely to exceed \$1,250,000 relative to the bond claims.

44. GCNA is entitled to the entry of judgment against the Indemnitors in an amount sufficient to fully indemnify and save GCNA harmless from and against all loss by the Indemnity Agreement relative to the bond claims, which amount will be proven at trial.

WHEREFORE, PREMISES CONSIDERED, GCNA prays for the following relief:

- a. For the issuance of process requiring each Defendant to answer GCNA's Complaint for Indemnity, Equitable, and Other Relief;
- b. For the entry of a judgment compelling the Indemnitors to specifically perform their obligation to deposit collateral with GCNA in the minimum amount of \$1,250,000, which is the amount as determined by GCNA sufficient to discharge any loss;
- c. For entry of a preliminary injunction and permanent injunction for the following relief: (i) that the Indemnitors be required to specifically perform their obligation to deposit cash collateral with GCNA in the minimum amount of \$1,250,000; and (ii) that the Indemnitors provide GCNA with immediate access to the Records;
- d. For the entry of judgment against the Indemnitors in an amount sufficient to fully exonerate, indemnify, and save GCNA harmless from and against all loss as defined by the Indemnity Agreement relative to the bond claims, which amount will be proven at trial;
- e. For the entry of judgment against the Unlimited Indemnity Indemnitors, jointly and severally, in an amount sufficient to fully exonerate, indemnify, and save GCNA harmless from and against all Loss as defined by the Indemnity Agreement relative to the Other Claims, which amount will be proven at trial; and
- f. For such further relief, both general and specific, as may be appropriate in accordance with the nature of this cause including, but not limited to, pre-judgment and post-judgment interest.

Respectfully submitted,

WEINSTEIN RADCLIFF PIPKIN LLP

/s/ Gregory M. Weinstein

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6688 North Central Expressway
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Dallas, Texas 75206
Telephone: 214.865.6126
Facsimile: 214.865.6140
gweinstein@weinrad.com

*Attorneys for The Guarantee Company of
North America USA*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

THE GUARANTEE COMPANY OF NORTH AMERICA,
USA

(b) County of Residence of First Listed Plaintiff Wayne County, Michigan
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Gregory M. Weinstein, Weinstein Radcliff Pipkin
6688 N. Central Expressway, Ste. 675, Dallas, TX. 75206

DEFENDANTS

TEXAS DESCON, L.P., DESCON 4S LLC, and MICHAEL
D. SMITH

County of Residence of First Listed Defendant Hidalgo County, Texas
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|---------------------------------------|---|---------------------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Section 1332

Brief description of cause:
Breach of contract and Request for Injunctive relief

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
580,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE
07/28/2015

SIGNATURE OF ATTORNEY OF RECORD
/s/ Gregory M. Weinstein

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. (a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. **Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT 1



THE GUARANTEE

**THE GUARANTEE COMPANY OF NORTH AMERICA USA
GENERAL AGREEMENT OF INDEMNITY**

This General Agreement of Indemnity (Agreement) is made and entered into this 6th day of JUNE, 2014 by:

<u>Name</u>	<u>Social Security or Tax ID Number</u>
<u>Texas Descon, L.P.</u>	<u>20-5684955</u>
<u>Descon 4S, LLC</u>	<u>80-060-3077</u>
<u>Michael D. Smith</u>	<u>454-15-6380</u>

(hereinafter collectively referred to as "Indemnitors"), jointly, severally, collectively and individually, and for the benefit of The Guarantee Company of North America USA, One Towne Square, Ste. 1470, Southfield, Michigan 48076, and its affiliated, associated and subsidiary companies, their successors and assigns (hereinafter referred to as "Surety").

In consideration of the execution of any such Bonds for Principal and as an inducement to such execution by Surety, the Indemnitors, jointly and severally, agree as follows.

DEFINITIONS: Where they appear in this Agreement, the following terms shall be considered as defined in this paragraph:

Principal: One or more Indemnitors or any existing or future partnerships, joint ventures (whether silent or disclosed), associations, limited liability companies, corporations or other legal or commercial entities in which Indemnitors have or will have a substantial, material, financial and/or beneficial interest, including subsidiaries, associated and affiliated companies who alone or with other Person(s) have secured or may secure the performance and fulfillment of obligations by Bond(s), executed, provided or procured by Surety.

Bond: Any and all bonds, undertakings, contracts of suretyship, guaranties or indemnity, issued on behalf of the Principal and signed by the Surety or Additional Sureties, or by the Surety or Additional Sureties and any co-sureties, or procured for the Principal by the Surety or Additional Sureties, whether such bonds, undertakings, contracts of suretyship, guaranties or indemnity are executed before or after the execution of this Agreement.

Surety: Any one or combination of the following: The Guarantee Company of North America USA, any person or entity joining with any of the aforesaid companies in executing any Bond, executing any Bond at their request or providing reinsurance to them with respect to any Bond and any subsidiaries, successors, and assigns thereof.

Contract: Any agreement between or among Principal and any one or more parties other than the Surety, together with all associated documents, including but not limited to general and special conditions, specifications, drawings, schedules and/or CPMs, whether or not the Surety has executed or procured the execution of any Bond in connection therewith.

Event of Default: Principal shall be deemed to be in default under this Agreement in the event of:

1. The failure of any Principal or Indemnitor to pay any premium to the Surety or to any agent of the Surety, including but not limited to additional premiums based on an overrun in contract price, when due or as demanded thereafter by the Surety;
2. The declaration by any Bond Obligatee or Project Owner that any Principal is in default under any Contract;
3. Any abandonment, forfeiture, breach, failure, refusal or inability, whether actual or alleged, to perform any Contract, or any obligation contained therein;
4. A determination by the Surety, in its sole and absolute discretion, that the Principal's successful bid on a Bonded Contract was significantly lower than the bid of either or both of the next two (2) highest bidders;
5. Fails to pay, to the extent due in whole or in part, claims, bills or other indebtedness incurred in connection with the performance of any Contract;
6. Becomes the subject of any agreement or proceeding of liquidation or receivership, or actually becomes insolvent;
7. The initiation of any proceeding which materially deprives any Principal of the use of such Principal's plant, facilities, equipment, machinery, tools, supplies or materials;
8. If an individual sole proprietor dies, is adjudged mentally incompetent, is convicted of a felony or disappears and cannot be immediately found by Surety by use of usual methods;
9. The submission to the Surety or the Surety's agent by any Principal or Indemnitor of any information used by the Surety in the process of underwriting any Bond which is determined by the Surety, at any time, to be or to have been, materially false, incomplete, or misleading;

10. Receipt of any information by the Surety or the existence of any facts relating to the financial condition of any Principal or Indemnitor which causes the Surety, in its sole and absolute discretion, to believe that such Principal or Indemnitor may be unable to perform or meet any of their obligations under this Agreement;
11. Breaches, fails to perform, or comply with, any provision of this Agreement.

INDEMNITY TO SURETY: Indemnitors agree to pay to Surety upon demand:

1. All loss, costs and expenses of whatsoever kind and nature, including court costs, attorney fees (whether Surety at its sole option elects to employ its own attorney, or permits or requires Indemnitors to make arrangements for Surety's legal representation), in-house fees, consultant fees, investigative costs and any other losses, costs or expenses incurred by Surety by reason of:
 - a. Surety having executed, provided or procured any Bond;
 - b. any Default under this Agreement by any of the Indemnitors;
 - c. Surety enforcing any of the covenants or conditions of this Agreement;
 - d. Surety conducting any investigation, obtaining or attempting to obtain a release, or recovering or attempting to recover loss or unpaid premium in connection with any Bonds; and/or
 - e. Surety prosecuting or defending any action or claim in connection with any Bonds executed provided or procured on behalf of Principal or Indemnitors, whether Surety at its sole option elects to employ its own counsel, or permits or requires Indemnitors to make arrangements for Surety's legal representation. In addition the Indemnitors agree to pay Surety interest on all disbursements made by Surety in connection with such loss, costs and expenses incurred by Surety at the maximum rate permitted by law calculated from the date of each disbursement;
2. Any amount sufficient to discharge any claim made against Surety on any Bond, whether Surety will have made any payment or established any reserve therefor. Such payment shall be equal to the larger of (a) the amount of any reserve set by the Surety, or (b) such amount as the Surety, in its sole judgment, shall deem is sufficient to protect it from loss. This sum may be used by Surety to pay such claim or be held by Surety as collateral security against loss on any Bond. Surety shall have no obligation to invest or provide a return on the funds deposited. The Indemnitors acknowledge that their failure to pay, immediately on demand, that sum demanded by Surety will cause irreparable harm for which Surety has no adequate remedy at law. The Indemnitors confirm and acknowledge that Surety is entitled to injunctive relief for specific enforcement of the foregoing provision.
3. Any original, additional or renewal premium due for any Bond.

CLAIMS AGAINST THE SURETY: With respect to claims against Surety, Indemnitors agree that:

1. Surety shall have the exclusive right for itself and the Indemnitors to determine in its sole and absolute discretion whether any claim or suit upon any bond shall, on the basis of belief of liability, expediency or otherwise, be paid, compromised, defended or appealed.
2. Surety may incur such expenses, including attorneys' fees, as deemed necessary or advisable in the investigation, defense and payment of such claims and completion of any Contract with respect to which Surety has issued any Bond.
3. In the event of any payment of any kind by the Surety, the Indemnitors further agree that the liability of the Indemnitors shall extend to and include, and the Surety shall be entitled to charge and recover for, any and all disbursements made by it in good faith under the belief that:
 - a. any Principal or Indemnitor is or has been in default under or pursuant to this Agreement;
 - b. the Surety was or might be liable to pay the claims asserted or the sums paid, whether or not such liability actually existed; or
 - c. such payments were or are necessary or expedient, in the Surety's sole and absolute discretion, to protect any of the Surety's rights or interests or to avoid or lessen the Surety's liability or alleged liability, whether or not such liability, necessity or expediency actually existed.
4. An itemized statement of loss and expense incurred by Surety, sworn to by an officer of Surety, shall be prima facie evidence of the fact and extent of the liability of the Indemnitors to Surety in any claim or suit by Surety against Indemnitors.

SURETY'S REMEDIES IN EVENT OF DEFAULT: In the event of an occurrence of an Event of Default, Surety, without notice to the Indemnitors, shall have the right, at its sole discretion, to:

1. Take possession of any part or all of the work under contracts secured by Bonds together with plant, machinery, equipment, job books and records, plans, drawings, tools, supplies or material wherever located and owned, leased or usable by Principal;
2. Assume all right, title and interest of the Principal or Indemnitors in and to all subcontracts and purchase orders, let or to be let, in connection with contracts secured by Bonds;
3. Assume all right, title and interest of Indemnitors in licenses, patents and copyrights which Surety deems necessary for completion of the contracts secured by Bonds;

4. At the expense of Indemnitors, complete or arrange for completion or consent to the Obligees' completion of part or all of the work under contracts secured by Bonds;
5. Assert, pursue or prosecute, in its discretion, and at the expense of Indemnitors in the name of Principal or in the name of Surety, all claims of Principal against Obligees on Bonds or against any person, subcontractor, supplier, government or governmental agency arising or growing out of contracts or work done thereunder secured by Bonds executed, provided or procured by Surety. The authority and power to prosecute said claims shall include the authority to settle said claims or any part thereof on such terms as the Surety believes to be in Surety's best interest;
6. Arrange with the Obligees of the Bonds for the delivery of the consideration for the performance of the contracts, including, but not limited to, all money or property due or to become due including accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof directly to Surety, endorse checks, drafts, warrants or other instruments issued or paid by such Obligees and to apply the proceeds for the purpose of the trust provided below or for any other purpose which advances the Surety's rights of exoneration, indemnification and subrogation.

Indemnitors waive all notice of such default and the payment of any claim or of the making of any loan to Principal or Indemnitors by Surety. Should Indemnitors learn of any claim or suit against Principal, in which Surety may be held liable, Indemnitors shall give prompt notice to Surety of such claim or suit.

Separate suits may be brought under this Agreement as causes of action accrue, and the pendency or termination of any such suit shall not bar any subsequent action by Surety.

SECURITY TO SURETY: As collateral security to Surety for the agreement of the Indemnitors to repay all loss and expense to Surety, whether heretofore or hereafter incurred, the Indemnitors:

1. Assign to Surety and grant a security interest to Surety in all rights of the Indemnitors in, or in any manner growing out of:
 - a. all rights of the Indemnitors in all contracts referred to in the Bonds, or secured by the Bonds and all money or property due or to become due Indemnitors arising out of or in any way relating to contracts performed by Indemnitors, whether secured by Bonds executed by Surety or not, including, but not limited to, accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof;
 - b. all rights of the Indemnitors in all contracts, including, but not limited to, unbonded contracts and/or contracts bonded by another surety, and all money or property due or to become due Indemnitors arising out of or in any way relating to such contracts, including, but not limited to, accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof;
 - c. all the right, title and interest of the Indemnitors in and to all machinery, equipment, vehicles, rolling stock, materials, inventory, leaseholds, fuel, plant, tools, furniture, goods, and personal and fixture property;
 - d. all money, cash, cash equivalents, bank accounts, deposit accounts (checking or savings), certificates of deposit, securities, bonds, negotiable instruments, instruments (including promissory notes), letter of credit rights, and all other investment property;
 - e. all subcontracts and purchase orders on projects in connection with which the Indemnitors have entered into contracts secured by Bonds executed by Surety and all surety bonds, undertakings or guarantees which secure said subcontracts or purchase orders;
 - f. all materials purchased for all contracts referred to in the Bonds, or secured by the Bonds, including material which is in the process of manufacture, in storage at any storage facility, or in transit to any project site;
 - g. all licenses, patents, copyrights and trade secrets;
 - h. all claims, causes of action, actions or demands and the proceeds thereof which Indemnitors may have against any subcontractor, vendor, materialman, owner, architect, engineer, accountant or others, whether arising out of contracts secured by Bond(s) executed by Surety or not;
 - i. all money, claims or causes of actions due, claimed or receivable on insurance policies including life insurance proceeds, builder risk policies, fire policies and casualty policies;
 - j. all warehouse receipts, bills of lading, general intangibles and farm products;
 - k. all tax refunds or claims for tax refunds;
 - l. all limited partnership and general partnership interests.

This ASSIGNMENT shall be effective as of the date of this Agreement but shall be enforceable only in the event of the occurrence of an Event of Default. The Indemnitors hereby authorize the Surety, at its option, to prosecute or enforce said assigned rights in the name of the Surety or in that of the Indemnitors and to endorse and to collect in the name of the Indemnitors or payee any checks, drafts, warrants or other instruments made or issued in payment of any such assigned

rights. Surety's exercise of any of its rights as a secured creditor under this Agreement shall not be a waiver of any of Surety's legal or equitable rights or remedies, including the Surety's rights of subrogation.

2. Irrevocably nominate and appoint any officer of Surety as the true and lawful attorney-in-fact of the Indemnitors, with full rights and authority in event of Principal's default to:
 - a. sign the name of the Indemnitors to any voucher, release, satisfaction, check, bill of sale of property referred to herein, or any other paper or contract necessary or desired to carry into effect the purposes of this Agreement;
 - b. dispose of performance of any Contract by subletting it in Principal's name or otherwise;
3. Authorize Surety to join any and all of the Indemnitors as parties defendant in any action, regardless of venue, against Surety on account of any Bond, and to enforce the obligations hereunder directly against any of the Indemnitors without the necessity of first proceeding against the Principal.
4. Agree that with respect to each specific contract secured by Bond executed, provided or procured by Surety on Principal's behalf, all money and property representing the consideration for the performance of the contract, (including, without limitation, the proceeds of claims for adjustments, additional compensation, compensation for the delay, extra work, change orders, insurance claims and all damage claims) whether in the possession of the Principal, Indemnitors or others and whether earned, unearned, paid, retained or to be paid shall be held in trust as trust funds for and shall be used solely for:
 - a. the performance of the contract;
 - b. the payment of obligations to subcontractors, laborers, and suppliers of materials and services incurred or to be incurred in the performance of the contract for which Surety is or may be liable under Bonds and;
 - c. the satisfaction of Indemnitors' obligations to Surety under this Agreement and all other indebtedness and liabilities of Indemnitors to Surety.
5. Agree that this Agreement constitutes a security agreement and a financing statement in accordance with the provisions of the Uniform Commercial Code of every jurisdiction in which such Code is in effect. The Surety may make such additions to this Agreement as may be necessary or desirable to permit its filing as a financing statement under the Code, and the Indemnitors shall execute and deliver such further instruments as may be necessary or desirable to permit either the filing of this Agreement as a financing statement or the filing of a financing statement based upon this Agreement in such states, counties and other places as the Surety may deem necessary or desirable. The filing or recording of such document shall be solely at the option of the Surety, and the failure to do so shall not release or impair any of the obligations of the Indemnitors under this Agreement. Any copy of this Agreement certified as such by the Surety shall be considered an original for purposes of filing as a financing statement.

GENERAL PROVISIONS:

1. Assent by Surety to changes in any Contract or Bond or refusal to assent shall not release or affect the obligations of Indemnitors to Surety even though any such assent by the Surety does or might increase the liability of the Indemnitors.
2. Surety has the right to decline to execute, provide or procure any bond requested by Principal or Indemnitors. If Surety does execute, provide or procure the execution of a bid bond or proposal bond, or agrees or consents to provide such contract of suretyship, Surety retains the right to decline to execute the final bond (including, but not limited to, performance, payment or maintenance) that may be required in connection with any award that may be made under the bid proposal or tender to which the bid proposal bond or agreement or consent to provide such contract of suretyship is given.
3. Surety shall have every right, defense or remedy which a personal surety without compensation would have, including the right of exoneration and the right of subrogation. The security interest, trust, and other rights granted herein will not be deemed a waiver of Surety's equitable subrogation rights or other rights, said security in rights being in addition to the rights of exoneration, subrogation, and other rights to which Surety is entitled to under law or in equity.
4. Until Surety shall have been furnished with the competent evidence of its discharge, without loss from any Bonds, Surety shall have the right to free access at reasonable times to the books, records and accounts of each of the Indemnitors for the purpose of examining, copying or reproducing them. Each one of the Indemnitors hereby authorizes any depositories in which funds of any of the Indemnitors may be deposited to furnish to Surety the amount of such deposits as of any date requested, and any legal entity doing business with the Indemnitors is authorized to furnish any information requested by Surety concerning any transaction. Surety may furnish in confidence copies of any information, which it now has or may hereafter obtain concerning each of the Indemnitors, to other persons or companies for the purpose of procuring co-suretyship or reinsurance or of advising interested persons or companies.
5. The Indemnitors will, on request of Surety, procure the discharge of Surety from any Bond and all liability by reason thereof. If such discharge is unattainable, the Indemnitors will, if requested by Surety, either deposit collateral with Surety, acceptable to Surety, sufficient to cover all exposure under such bond or bonds, or make provisions acceptable to Surety for the funding of the bonded obligations.
6. Indemnitors warrant that each of them is specifically and beneficially interested in the obtaining of each bond.
7. The addition to this Agreement of any Indemnitor, including any entities acquired after the date of execution of this Agreement, may be effected by written rider executed by such Indemnitor only, notwithstanding any language herein to the

contrary. The Indemnitors shall continue to remain bound under the terms of this Agreement even though the Surety may have heretofore or hereafter, with or without notice to or knowledge of the Indemnitors, accepted or released other agreements of indemnity or collateral in connection with the execution or procurement of said Bonds, from the Indemnitors or others. The rights, powers and remedies given the Surety under this Agreement shall be and are in addition to and not in lieu of, any and all other rights, powers and remedies which the Surety may have or acquire against the Indemnitors or others, whether by the terms of any agreement or by operation of law or otherwise.

8. The Indemnitors waive and subordinate all rights of indemnity, subrogation and contribution each against the other until all obligations to the Surety under this Agreement, at law or in equity, have been satisfied in full.
9. The Indemnitors hereby waive, to the extent provided by law, all rights to claim any of their property including their homesteads, as exempt from levy, sale, execution or other legal process.
10. The rights and remedies afforded to the Surety by the terms of this Agreement and the terms themselves may not be waived or modified orally. No Rider or Amendment to this Agreement shall be active until signed by an employee of the Surety.
11. This Agreement is to be liberally construed so as to protect, exonerate and indemnify the Surety. The invalidity of any provision of this Agreement by reason of the law of any state or by any other reason shall not affect the validity of any other provision of this Agreement, and the Indemnitors shall remain fully bound and liable hereunder to the Surety to the same extent as if the invalid provision had not existed.
12. All parties agree that any microfilmed, scanned or electronically digitized copy of this document made by Surety as part of its record storage and retention program shall be as effective as the original for all purposes. The Agreement, its riders and addends may be executed in separate counterparts, none of which need contain signatures of all parties, each of which shall be deemed an original, and all of which taken together constitute one and the same instrument.
13. The Indemnitors have relied upon their own due diligence in making their own independent appraisal of Principal and its business and financial condition, will continue to be responsible for making their own independent appraisal of such matters, and have not relied upon and will not hereafter rely upon Surety for information. Surety has no duty to inform any of the Indemnitors of the financial condition or other affairs related to Principal.
14. The Indemnitors shall remain responsible to Surety under this Agreement regardless of any changes in the relationship of the Indemnitors with Principal.
15. Wherever used in this instrument, the plural shall include the singular, the singular shall include the plural, and the neuter shall include both genders as the circumstances require.
16. Indemnitors agree to give written notice to the Surety of any anticipated change of more than ten percent in ownership or control of the Indemnitors.
17. The Indemnitors agree to submit themselves to personal jurisdiction in the State of Michigan, in whatever jurisdiction in which the Surety sustains or pays any loss for which the Indemnitors are liable hereunder and in whatever jurisdiction Surety may be sued as a consequence of its having issued any Bond. With respect to any action brought by the Surety on this Agreement in a jurisdiction in which one or more of the Indemnitors reside, are domiciled, are doing business or are found, each of the Indemnitors who are not in the jurisdiction hereby designates each of the Indemnitors in such jurisdiction as his agent to receive on his behalf service of process in such action.

WAIVER OF TRIAL BY JURY: The Indemnitors hereby waive trial by jury in any action or proceeding to which any or all of the Indemnitors and the Surety may be parties, arising out of or in any way pertaining to this Agreement. It is agreed and understood that this waiver constitutes a waiver of trial by jury of all claims against all parties to such actions or proceedings, including claims against parties who are not parties to this Agreement.

TERMINATION: This Agreement is a continuing obligation of the Indemnitors unless terminated as provided in this paragraph. An Indemnitor desiring to terminate liability as to future Bonds of Principal must:

1. Give written notice to Surety at The Guarantee Company of North America USA, One Towne Square, Ste. 1470, Southfield, Michigan 48076, by certified or registered mail, of such termination;
2. State in such notice the effective date (not less than thirty days after the receipt of notice by Surety) of termination of such Indemnitor's liability for future Bonds.
3. It is understood and agreed that oral notice to or constructive notice to any agent or employee of Surety shall not constitute effective notice of termination under this agreement.

After the effective date of termination, the Indemnitor giving notice shall be liable hereunder for:

1. Bonds executed or authorized prior to such date, and renewals and extension thereof;
2. Bonds executed pursuant to a bid or proposal bond executed or authorized prior to such date, and renewals and extensions thereof.

Such termination of liability as to an Indemnitor shall in no way affect the obligation of any other Indemnitor who has not given notice as herein provided.

REPRESENTATIONS: EACH OF THE INDEMNITORS REPRESENTS TO THE SURETY THAT HE HAS CAREFULLY READ THE ENTIRE AGREEMENT AND THAT THERE ARE NO OTHER AGREEMENTS OR UNDERSTANDINGS WHICH IN ANY WAY LESSEN OR MODIFY THE OBLIGATIONS SET FORTH HEREIN, OR, TO THE EXTENT SUCH OTHER AGREEMENTS OR UNDERSTANDINGS EXIST, THEY ARE HEREBY SUPERSEDED BY THIS AGREEMENT.

ENTITY INDEMNITOR ACKNOWLEDGEMENT

Entity Name: Texas Descon, L.P.
BY: [Signature]
Name: Michael D. Smith Title: Managing Member of Descon 4S, LLC, General Partner
Entity Tax ID #: 20-5684955

STATE OF TEXAS, COUNTY OF Hidalgo:
On June 6, 2014, before me, Pilar Anzaldue-Garza
(insert name and title of notary/officer)
personally appeared Michael D. Smith, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of TEXAS that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

Signature: [Signature] (SEAL)



ENTITY INDEMNITOR ACKNOWLEDGEMENT

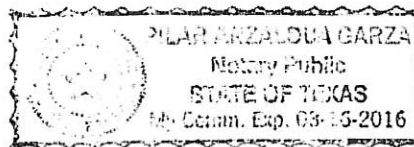
Entity Name: Descon 4S, LLC
BY: [Signature]
Name: Michael D. Smith Title: Managing Member
Entity Tax ID #: 80-060-3077

STATE OF TEXAS, COUNTY OF Hidalgo:
On June 6, 2014, before me, Pilar Anzaldue-Garza
(insert name and title of notary/officer)
personally appeared Michael D. Smith, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of TEXAS that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

Signature: [Signature] (SEAL)



INDIVIDUAL INDEMNITOR ACKNOWLEDGEMENT

BY: [Signature]
Name: Michael D. Smith
Address: 5006 W. Chapin Rd. Edinburg, Texas 78541
Social Security #: 454-15-6380

STATE OF TEXAS, COUNTY OF Hidalgo:
On June 6, 2014, before me, Pilar Anzaldua Garza
(insert name and title of notary/officer)
personally appeared Michael D. Smith, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.
I certify under PENALTY OF PERJURY under the laws of the State of TEXAS that the foregoing paragraph is true and correct.
WITNESS my hand and official seal
Signature: Pilar Anzaldua Garza (SEAL)

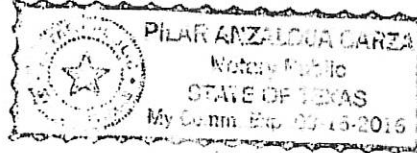


EXHIBIT 2



July 17, 2015

Texas Descon, L.P.
5801 N. 10th Street, Ste. 500
McAllen, TX 78504

Michael D. Smith
5006 W. Chapin Road
Edinburg, TX 78541

Descon 4S, LLC
5801 N. 10th Street, Ste. 500
McAllen, TX 78504

RE: Principals: Texas Descon, L.P.
File No.s: S14030242
S15030053
Bond No.s: SS70111644
SS70111645
Projects: San Diego ISD New Jr. High School
San Juan 3.5 MGD Water Treatment Plant No. 2

Dear Indemnitors:

This letter is being sent to Texas Descon, L.P, Descon 4S, LLC, and Michael D. Smith, collectively referred to hereafter as the "Indemnitors.

On June 6, 2014, the Indemnitors executed a General Agreement of Indemnity ("GAI") in favor of The Guarantee Company of North America USA ("The Guarantee"), a copy of which is enclosed herein. The GAI defines an Event of Default, among other things, as:

5. Fails to pay, to the extent due in whole or in part, claims, bills or other indebtedness incurred in connection with the performance of any Contract;

10. Receipt of any information by the Surety or the existence of any facts relating to the financial condition of any Principal or Indemnitor which causes the Surety, in its sole and absolute discretion, to believe that such Principal or Indemnitor may be unable to perform or meet any of their obligations under this Agreement;

The Guarantee has received numerous claims from unpaid subcontractors and suppliers on the two referenced projects. It has also come to our attention the recent payments by the project owners to Texas

One Towne Square, Suite 1470, Southfield, Michigan, USA 48076 | Tel: 248.281.0281 1.866.328.0567 | Fax: 248.750.0431

Excellence, Expertise, Experience ... Every time | theguaranteeus.com

Indemnitors
July 17, 2015
Page 2 of 2

Descon have not been applied to corresponding bills from subcontractors or suppliers. Because of this, subcontractors have declared Texas Descon to be in default and have stopped work.

The GAI also provides that:

INDEMNITY TO SURETY: Indemnitors agree to pay to Surety upon demand:

2. Any amount sufficient to discharge any claim made against Surety on any Bond, whether Surety will have made any payment or established any reserve therefor. Such payment shall be equal to the larger of (a) the amount of any reserve set by the Surety, or (b) such amount as the Surety, in its sole judgment, shall deem is sufficient to protect it from loss. This sum may be used by Surety to pay such claim or be held by Surety as collateral security against loss on any Bond. Surety shall have no obligation to invest or provide a return on the funds deposited. The Indemnitors acknowledge that their failure to pay, immediately on demand, that sum demanded by Surety will cause irreparable harm for which Surety has no adequate remedy at law. The Indemnitors confirm and acknowledge that Surety is entitled to injunctive relief for specific enforcement of the foregoing provision.

The Guarantee has received approximately \$580,000.00 in unresolved claims against its referenced payment bonds. At this time, and reserving the right to amend this demand, The Guarantee demands that the Indemnitors post collateral in the amount of Five Hundred and Eighty Thousand Dollars and 0/100 (\$580,000.00) to be held by The Guarantee as security for, and/or to reimburse The Guarantee for any and all loss, cost and expense, including, but not limited to, professional and consulting fees and interest incurred by The Guarantee in connection with the issuance of said Bonds to the referenced Principals. The Guarantee further demands that the \$580,000.00 in collateral be forwarded to The Guarantee on or before Friday, July 24, 2015.

This correspondence and all prior or subsequent communications are made with express reservation of all rights and defenses that may be available to The Guarantee Company of North America USA, at law or in equity, under the terms and provisions of the Agreement of Indemnity.

Should you have any questions, please feel free to call me at (248) 281-0281 x66024 or jjubera@gcna.com.

Sincerely,

Guarantee Company of North American USA



Jeffrey S. Jubera
Vice President – Claims & General Counsel

cc: Gregory Weinstein, Weinstein Radcliff Pipkin LLP
Stephanie O'Rourke, Cokinos Bosien & Young





**THE GUARANTEE COMPANY OF NORTH AMERICA USA
GENERAL AGREEMENT OF INDEMNITY**

This General Agreement of Indemnity (Agreement) is made and entered into this 6th day of JUNE, 2014 by:

<u>Name</u>	<u>Social Security or Tax ID Number</u>
<u>Texas Descon, L.P.</u>	<u>20-5684955</u>
<u>Descon 4S, LLC</u>	<u>80-060-3077</u>
<u>Michael D. Smith</u>	<u>454-15-6380</u>

(hereinafter collectively referred to as "Indemnitors"), jointly, severally, collectively and individually, and for the benefit of The Guarantee Company of North America USA, One Towne Square, Ste. 1470, Southfield, Michigan 48076, and its affiliated, associated and subsidiary companies, their successors and assigns (hereinafter referred to as "Surety").

In consideration of the execution of any such Bonds for Principal and as an inducement to such execution by Surety, the Indemnitors, jointly and severally, agree as follows.

DEFINITIONS: Where they appear in this Agreement, the following terms shall be considered as defined in this paragraph:

Principal: One or more Indemnitors or any existing or future partnerships, joint ventures (whether silent or disclosed), associations, limited liability companies, corporations or other legal or commercial entities in which Indemnitors have or will have a substantial, material, financial and/or beneficial interest, including subsidiaries, associated and affiliated companies who alone or with other Person(s) have secured or may secure the performance and fulfillment of obligations by Bond(s), executed, provided or procured by Surety.

Bond: Any and all bonds, undertakings, contracts of suretyship, guaranties or indemnity, issued on behalf of the Principal and signed by the Surety or Additional Sureties, or by the Surety or Additional Sureties and any co-sureties, or procured for the Principal by the Surety or Additional Sureties, whether such bonds, undertakings, contracts of suretyship, guaranties or indemnity are executed before or after the execution of this Agreement.

Surety: Any one or combination of the following: The Guarantee Company of North America USA, any person or entity joining with any of the aforesaid companies in executing any Bond, executing any Bond at their request or providing reinsurance to them with respect to any Bond and any subsidiaries, successors, and assigns thereof.

Contract: Any agreement between or among Principal and any one or more parties other than the Surety, together with all associated documents, including but not limited to general and special conditions, specifications, drawings, schedules and/or CPMs, whether or not the Surety has executed or procured the execution of any Bond in connection therewith.

Event of Default: Principal shall be deemed to be in default under this Agreement in the event of:

1. The failure of any Principal or Indemnitor to pay any premium to the Surety or to any agent of the Surety, including but not limited to additional premiums based on an overrun in contract price, when due or as demanded thereafter by the Surety;
2. The declaration by any Bond Obligor or Project Owner that any Principal is in default under any Contract;
3. Any abandonment, forfeiture, breach, failure, refusal or inability, whether actual or alleged, to perform any Contract, or any obligation contained therein;
4. A determination by the Surety, in its sole and absolute discretion, that the Principal's successful bid on a Bonded Contract was significantly lower than the bid of either or both of the next two (2) highest bidders;
5. Fails to pay, to the extent due in whole or in part, claims, bills or other indebtedness incurred in connection with the performance of any Contract;
6. Becomes the subject of any agreement or proceeding of liquidation or receivership, or actually becomes insolvent;
7. The initiation of any proceeding which materially deprives any Principal of the use of such Principal's plant, facilities, equipment, machinery, tools, supplies or materials;
8. If an individual sole proprietor dies, is adjudged mentally incompetent, is convicted of a felony or disappears and cannot be immediately found by Surety by use of usual methods;
9. The submission to the Surety or the Surety's agent by any Principal or Indemnitor of any information used by the Surety in the process of underwriting any Bond which is determined by the Surety, at any time, to be or to have been, materially false, incomplete, or misleading;

10. Receipt of any information by the Surety or the existence of any facts relating to the financial condition of any Principal or Indemnitor which causes the Surety, in its sole and absolute discretion, to believe that such Principal or Indemnitor may be unable to perform or meet any of their obligations under this Agreement;
11. Breaches, fails to perform, or comply with, any provision of this Agreement.

INDEMNITY TO SURETY: Indemnitors agree to pay to Surety upon demand:

1. All loss, costs and expenses of whatsoever kind and nature, including court costs, attorney fees (whether Surety at its sole option elects to employ its own attorney, or permits or requires Indemnitors to make arrangements for Surety's legal representation), in-house fees, consultant fees, investigative costs and any other losses, costs or expenses incurred by Surety by reason of:
 - a. Surety having executed, provided or procured any Bond;
 - b. any Default under this Agreement by any of the Indemnitors;
 - c. Surety enforcing any of the covenants or conditions of this Agreement;
 - d. Surety conducting any investigation, obtaining or attempting to obtain a release, or recovering or attempting to recover loss or unpaid premium in connection with any Bonds; and/or
 - e. Surety prosecuting or defending any action or claim in connection with any Bonds executed provided or procured on behalf of Principal or Indemnitors, whether Surety at its sole option elects to employ its own counsel, or permits or requires Indemnitors to make arrangements for Surety's legal representation. In addition the Indemnitors agree to pay Surety interest on all disbursements made by Surety in connection with such loss, costs and expenses incurred by Surety at the maximum rate permitted by law calculated from the date of each disbursement;
2. Any amount sufficient to discharge any claim made against Surety on any Bond, whether Surety will have made any payment or established any reserve therefor. Such payment shall be equal to the larger of (a) the amount of any reserve set by the Surety, or (b) such amount as the Surety, in its sole judgment, shall deem is sufficient to protect it from loss. This sum may be used by Surety to pay such claim or be held by Surety as collateral security against loss on any Bond. Surety shall have no obligation to invest or provide a return on the funds deposited. The Indemnitors acknowledge that their failure to pay, immediately on demand, that sum demanded by Surety will cause irreparable harm for which Surety has no adequate remedy at law. The Indemnitors confirm and acknowledge that Surety is entitled to injunctive relief for specific enforcement of the foregoing provision.
3. Any original, additional or renewal premium due for any Bond.

CLAIMS AGAINST THE SURETY: With respect to claims against Surety, Indemnitors agree that:

1. Surety shall have the exclusive right for itself and the Indemnitors to determine in its sole and absolute discretion whether any claim or suit upon any bond shall, on the basis of belief of liability, expediency or otherwise, be paid, compromised, defended or appealed.
2. Surety may incur such expenses, including attorneys' fees, as deemed necessary or advisable in the investigation, defense and payment of such claims and completion of any Contract with respect to which Surety has issued any Bond.
3. In the event of any payment of any kind by the Surety, the Indemnitors further agree that the liability of the Indemnitors shall extend to and include, and the Surety shall be entitled to charge and recover for, any and all disbursements made by it in good faith under the belief that:
 - a. any Principal or Indemnitor is or has been in default under or pursuant to this Agreement;
 - b. the Surety was or might be liable to pay the claims asserted or the sums paid, whether or not such liability actually existed; or
 - c. such payments were or are necessary or expedient, in the Surety's sole and absolute discretion, to protect any of the Surety's rights or interests or to avoid or lessen the Surety's liability or alleged liability, whether or not such liability, necessity or expediency actually existed.
4. An itemized statement of loss and expense incurred by Surety, sworn to by an officer of Surety, shall be prima facie evidence of the fact and extent of the liability of the Indemnitors to Surety in any claim or suit by Surety against Indemnitors.

SURETY'S REMEDIES IN EVENT OF DEFAULT: In the event of an occurrence of an Event of Default, Surety, without notice to the Indemnitors, shall have the right, at its sole discretion, to:

1. Take possession of any part or all of the work under contracts secured by Bonds together with plant, machinery, equipment, job books and records, plans, drawings, tools, supplies or material wherever located and owned, leased or usable by Principal;
2. Assume all right, title and interest of the Principal or Indemnitors in and to all subcontracts and purchase orders, let or to be let, in connection with contracts secured by Bonds;
3. Assume all right, title and interest of Indemnitors in licenses, patents and copyrights which Surety deems necessary for completion of the contracts secured by Bonds;

4. At the expense of Indemnitors, complete or arrange for completion or consent to the Obligor's completion of part or all of the work under contracts secured by Bonds;
5. Assert, pursue or prosecute, in its discretion, and at the expense of Indemnitors in the name of Principal or in the name of Surety, all claims of Principal against Obligees on Bonds or against any person, subcontractor, supplier, government or governmental agency arising or growing out of contracts or work done thereunder secured by Bonds executed, provided or procured by Surety. The authority and power to prosecute said claims shall include the authority to settle said claims or any part thereof on such terms as the Surety believes to be in Surety's best interest;
6. Arrange with the Obligees of the Bonds for the delivery of the consideration for the performance of the contracts, including, but not limited to, all money or property due or to become due including accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof directly to Surety, endorse checks, drafts, warrants or other instruments issued or paid by such Obligees and to apply the proceeds for the purpose of the trust provided below or for any other purpose which advances the Surety's rights of exoneration, indemnification and subrogation.

Indemnitors waive all notice of such default and the payment of any claim or of the making of any loan to Principal or Indemnitors by Surety. Should Indemnitors learn of any claim or suit against Principal, in which Surety may be held liable, Indemnitors shall give prompt notice to Surety of such claim or suit.

Separate suits may be brought under this Agreement as causes of action accrue, and the pendency or termination of any such suit shall not bar any subsequent action by Surety.

SECURITY TO SURETY: As collateral security to Surety for the agreement of the Indemnitors to repay all loss and expense to Surety, whether heretofore or hereafter incurred, the Indemnitors:

1. Assign to Surety and grant a security interest to Surety in all rights of the Indemnitors in, or in any manner growing out of:
 - a. all rights of the Indemnitors in all contracts referred to in the Bonds, or secured by the Bonds and all money or property due or to become due Indemnitors arising out of or in any way relating to contracts performed by Indemnitors, whether secured by Bonds executed by Surety or not, including, but not limited to, accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof;
 - b. all rights of the Indemnitors in all contracts, including, but not limited to, unbonded contracts and/or contracts bonded by another surety, and all money or property due or to become due Indemnitors arising out of or in any way relating to such contracts, including, but not limited to, accounts receivable, progress payments, deferred payments, retained percentages, compensation for extra work and claims and the proceeds thereof;
 - c. all the right, title and interest of the Indemnitors in and to all machinery, equipment, vehicles, rolling stock, materials, inventory, leaseholds, fuel, plant, tools, furniture, goods, and personal and fixture property;
 - d. all money, cash, cash equivalents, bank accounts, deposit accounts (checking or savings), certificates of deposit, securities, bonds, negotiable instruments, instruments (including promissory notes), letter of credit rights, and all other investment property;
 - e. all subcontracts and purchase orders on projects in connection with which the Indemnitors have entered into contracts secured by Bonds executed by Surety and all surety bonds, undertakings or guarantees which secure said subcontracts or purchase orders;
 - f. all materials purchased for all contracts referred to in the Bonds, or secured by the Bonds, including material which is in the process of manufacture, in storage at any storage facility, or in transit to any project site;
 - g. all licenses, patents, copyrights and trade secrets;
 - h. all claims, causes of action, actions or demands and the proceeds thereof which Indemnitors may have against any subcontractor, vendor, materialman, owner, architect, engineer, accountant or others, whether arising out of contracts secured by Bond(s) executed by Surety or not;
 - i. all money, claims or causes of actions due, claimed or receivable on insurance policies including life insurance proceeds, builder risk policies, fire policies and casualty policies;
 - j. all warehouse receipts, bills of lading, general intangibles and farm products;
 - k. all tax refunds or claims for tax refunds;
 - l. all limited partnership and general partnership interests.

This ASSIGNMENT shall be effective as of the date of this Agreement but shall be enforceable only in the event of the occurrence of an Event of Default. The Indemnitors hereby authorize the Surety, at its option, to prosecute or enforce said assigned rights in the name of the Surety or in that of the Indemnitors and to endorse and to collect in the name of the Indemnitors or payee any checks, drafts, warrants or other instruments made or issued in payment of any such assigned

rights. Surety's exercise of any of its rights as a secured creditor under this Agreement shall not be a waiver of any of Surety's legal or equitable rights or remedies, including the Surety's rights of subrogation.

2. Irrevocably nominate and appoint any officer of Surety as the true and lawful attorney-in-fact of the Indemnitors, with full rights and authority in event of Principal's default to:
 - a. sign the name of the Indemnitors to any voucher, release, satisfaction, check, bill of sale of property referred to herein, or any other paper or contract necessary or desired to carry into effect the purposes of this Agreement;
 - b. dispose of performance of any Contract by subletting it in Principal's name or otherwise;
3. Authorize Surety to join any and all of the Indemnitors as parties defendant in any action, regardless of venue, against Surety on account of any Bond, and to enforce the obligations hereunder directly against any of the Indemnitors without the necessity of first proceeding against the Principal.
4. Agree that with respect to each specific contract secured by Bond executed, provided or procured by Surety on Principal's behalf, all money and property representing the consideration for the performance of the contract, (including, without limitation, the proceeds of claims for adjustments, additional compensation, compensation for the delay, extra work, change orders, insurance claims and all damage claims) whether in the possession of the Principal, Indemnitors or others and whether earned, unearned, paid, retained or to be paid shall be held in trust as trust funds for and shall be used solely for:
 - a. the performance of the contract;
 - b. the payment of obligations to subcontractors, laborers, and suppliers of materials and services incurred or to be incurred in the performance of the contract for which Surety is or may be liable under Bonds and;
 - c. the satisfaction of Indemnitors' obligations to Surety under this Agreement and all other indebtedness and liabilities of Indemnitors to Surety.
5. Agree that this Agreement constitutes a security agreement and a financing statement in accordance with the provisions of the Uniform Commercial Code of every jurisdiction in which such Code is in effect. The Surety may make such additions to this Agreement as may be necessary or desirable to permit its filing as a financing statement under the Code, and the Indemnitors shall execute and deliver such further instruments as may be necessary or desirable to permit either the filing of this Agreement as a financing statement or the filing of a financing statement based upon this Agreement in such states, counties and other places as the Surety may deem necessary or desirable. The filing or recording of such document shall be solely at the option of the Surety, and the failure to do so shall not release or impair any of the obligations of the Indemnitors under this Agreement. Any copy of this Agreement certified as such by the Surety shall be considered an original for purposes of filing as a financing statement.

GENERAL PROVISIONS:

1. Assent by Surety to changes in any Contract or Bond or refusal to assent shall not release or affect the obligations of Indemnitors to Surety even though any such assent by the Surety does or might increase the liability of the Indemnitors.
2. Surety has the right to decline to execute, provide or procure any bond requested by Principal or Indemnitors. If Surety does execute, provide or procure the execution of a bid bond or proposal bond, or agrees or consents to provide such contract of suretyship, Surety retains the right to decline to execute the final bond (including, but not limited to, performance, payment or maintenance) that may be required in connection with any award that may be made under the bid proposal or tender to which the bid proposal bond or agreement or consent to provide such contract of suretyship is given.
3. Surety shall have every right, defense or remedy which a personal surety without compensation would have, including the right of exoneration and the right of subrogation. The security interest, trust, and other rights granted herein will not be deemed a waiver of Surety's equitable subrogation rights or other rights, said security in rights being in addition to the rights of exoneration, subrogation, and other rights to which Surety is entitled to under law or in equity.
4. Until Surety shall have been furnished with the competent evidence of its discharge, without loss from any Bonds, Surety shall have the right to free access at reasonable times to the books, records and accounts of each of the Indemnitors for the purpose of examining, copying or reproducing them. Each one of the Indemnitors hereby authorizes any depositories in which funds of any of the Indemnitors may be deposited to furnish to Surety the amount of such deposits as of any date requested, and any legal entity doing business with the Indemnitors is authorized to furnish any information requested by Surety concerning any transaction. Surety may furnish in confidence copies of any information, which it now has or may hereafter obtain concerning each of the Indemnitors, to other persons or companies for the purpose of procuring co-suretyship or reinsurance or of advising interested persons or companies.
5. The Indemnitors will, on request of Surety, procure the discharge of Surety from any Bond and all liability by reason thereof. If such discharge is unattainable, the Indemnitors will, if requested by Surety, either deposit collateral with Surety, acceptable to Surety, sufficient to cover all exposure under such bond or bonds, or make provisions acceptable to Surety for the funding of the bonded obligations.
6. Indemnitors warrant that each of them is specifically and beneficially interested in the obtaining of each bond.
7. The addition to this Agreement of any Indemnitor, including any entities acquired after the date of execution of this Agreement, may be effected by written rider executed by such Indemnitor only, notwithstanding any language herein to the

contrary. The Indemnitors shall continue to remain bound under the terms of this Agreement even though the Surety may have heretofore or hereafter, with or without notice to or knowledge of the Indemnitors, accepted or released other agreements of indemnity or collateral in connection with the execution or procurement of said Bonds, from the Indemnitors or others. The rights, powers and remedies given the Surety under this Agreement shall be and are in addition to and not in lieu of, any and all other rights, powers and remedies which the Surety may have or acquire against the Indemnitors or others, whether by the terms of any agreement or by operation of law or otherwise.

8. The Indemnitors waive and subordinate all rights of indemnity, subrogation and contribution each against the other until all obligations to the Surety under this Agreement, at law or in equity, have been satisfied in full.
9. The Indemnitors hereby waive, to the extent provided by law, all rights to claim any of their property including their homesteads, as exempt from levy, sale, execution or other legal process.
10. The rights and remedies afforded to the Surety by the terms of this Agreement and the terms themselves may not be waived or modified orally. No Rider or Amendment to this Agreement shall be active until signed by an employee of the Surety.
11. This Agreement is to be liberally construed so as to protect, exonerate and indemnify the Surety. The invalidity of any provision of this Agreement by reason of the law of any state or by any other reason shall not affect the validity of any other provision of this Agreement, and the Indemnitors shall remain fully bound and liable hereunder to the Surety to the same extent as if the invalid provision had not existed.
12. All parties agree that any microfilmed, scanned or electronically digitized copy of this document made by Surety as part of its record storage and retention program shall be as effective as the original for all purposes. The Agreement, its riders and addends may be executed in separate counterparts, none of which need contain signatures of all parties, each of which shall be deemed an original, and all of which taken together constitute one and the same instrument.
13. The Indemnitors have relied upon their own due diligence in making their own independent appraisal of Principal and its business and financial condition, will continue to be responsible for making their own independent appraisal of such matters, and have not relied upon and will not hereafter rely upon Surety for information. Surety has no duty to inform any of the Indemnitors of the financial condition or other affairs related to Principal.
14. The Indemnitors shall remain responsible to Surety under this Agreement regardless of any changes in the relationship of the Indemnitors with Principal.
15. Wherever used in this instrument, the plural shall include the singular, the singular shall include the plural, and the neuter shall include both genders as the circumstances require.
16. Indemnitors agree to give written notice to the Surety of any anticipated change of more than ten percent in ownership or control of the Indemnitors.
17. The Indemnitors agree to submit themselves to personal jurisdiction in the State of Michigan, in whatever jurisdiction in which the Surety sustains or pays any loss for which the Indemnitors are liable hereunder and in whatever jurisdiction Surety may be sued as a consequence of its having issued any Bond. With respect to any action brought by the Surety on this Agreement in a jurisdiction in which one or more of the Indemnitors reside, are domiciled, are doing business or are found, each of the Indemnitors who are not in the jurisdiction hereby designates each of the Indemnitors in such jurisdiction as his agent to receive on his behalf service of process in such action.

WAIVER OF TRIAL BY JURY: The Indemnitors hereby waive trial by jury in any action or proceeding to which any or all of the Indemnitors and the Surety may be parties, arising out of or in any way pertaining to this Agreement. It is agreed and understood that this waiver constitutes a waiver of trial by jury of all claims against all parties to such actions or proceedings, including claims against parties who are not parties to this Agreement.

TERMINATION: This Agreement is a continuing obligation of the Indemnitors unless terminated as provided in this paragraph. An Indemnitor desiring to terminate liability as to future Bonds of Principal must:

1. Give written notice to Surety at The Guarantee Company of North America USA, One Towne Square, Ste. 1470, Southfield, Michigan 48076, by certified or registered mail, of such termination;
2. State in such notice the effective date (not less than thirty days after the receipt of notice by Surety) of termination of such Indemnitor's liability for future Bonds.
3. It is understood and agreed that oral notice to or constructive notice to any agent or employee of Surety shall not constitute effective notice of termination under this agreement.

After the effective date of termination, the Indemnitor giving notice shall be liable hereunder for:

1. Bonds executed or authorized prior to such date, and renewals and extension thereof;
2. Bonds executed pursuant to a bid or proposal bond executed or authorized prior to such date, and renewals and extensions thereof.

Such termination of liability as to an Indemnitor shall in no way affect the obligation of any other Indemnitor who has not given notice as herein provided.

REPRESENTATIONS: EACH OF THE INDEMNITORS REPRESENTS TO THE SURETY THAT HE HAS CAREFULLY READ THE ENTIRE AGREEMENT AND THAT THERE ARE NO OTHER AGREEMENTS OR UNDERSTANDINGS WHICH IN ANY WAY LESSEN OR MODIFY THE OBLIGATIONS SET FORTH HEREIN, OR, TO THE EXTENT SUCH OTHER AGREEMENTS OR UNDERSTANDINGS EXIST, THEY ARE HEREBY SUPERSEDED BY THIS AGREEMENT.

ENTITY INDEMNITOR ACKNOWLEDGEMENT

Entity Name: Texas Descon, L.P.
BY: [Signature]
Name: Michael D. Smith Title: Managing Member of Descon 4S, LLC, General Partner
Entity Tax ID #: 20-5684955

STATE OF TEXAS, COUNTY OF Hidalgo
On June 6, 2014, before me, Pilar Anzaldúa-Garza
(insert name and title of notary/officer)
personally appeared Michael D. Smith, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.
I certify under PENALTY OF PERJURY under the laws of the State of TEXAS that the foregoing paragraph is true and correct.
WITNESS my hand and official seal

Signature: [Signature] (SEAL)

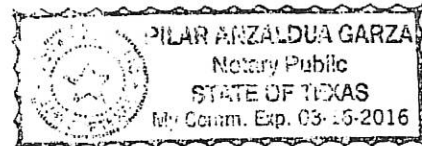


ENTITY INDEMNITOR ACKNOWLEDGEMENT

Entity Name: Descon 4S, LLC
BY: [Signature]
Name: Michael D. Smith Title: Managing Member
Entity Tax ID #: 80-060-3077

STATE OF TEXAS, COUNTY OF Hidalgo
On June 6, 2014, before me, Pilar Anzaldúa-Garza
(insert name and title of notary/officer)
personally appeared Michael D. Smith, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.
I certify under PENALTY OF PERJURY under the laws of the State of TEXAS that the foregoing paragraph is true and correct.
WITNESS my hand and official seal

Signature: [Signature] (SEAL)



INDIVIDUAL INDEMNITOR ACKNOWLEDGEMENT

BY: [Signature]
Name: Michael D. Smith
Address: 5006 W. Chapin Rd, Edinburg, Texas 78541
Social Security #: 454-15-6380

STATE OF TEXAS, COUNTY OF Hidalgo:
On June 6, 2014, before me, Pilar Anzaldúa Garza,
(insert name and title of notary/officer)
personally appeared Michael D Smith, who proved to me on the basis of satisfactory evidence
to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized
capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of TEXAS that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

Signature: [Signature] (SEAL)

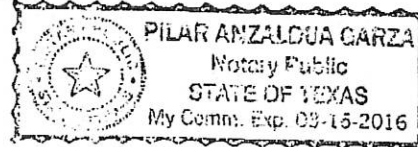


EXHIBIT 3



VIA EMAIL & OVERNIGHT MAIL

July 24, 2015

Texas Descon, L.P.
5801 N. 10th Street, Ste. 500
McAllen, TX 78504

Michael D. Smith
5006 W. Chapin Road
Edinburg, TX 78541

Descon 4S, LLC
5801 N. 10th Street, Ste. 500
McAllen, TX 78504

RE: Principals: Texas Descon, L.P.
File No.: S14030242
S15030053
Bond No.: SS70111644
SS70111645
Projects: San Diego ISD New Jr. High School
San Juan 3.5 MGD Water Treatment Plant No. 2

Dear Indemnitors:

On July 17, 2015, The Guarantee Company of North America USA ("The Guarantee") demanded a collateral payment in the amount of \$580,000.00. To date, The Guarantee has not received either the funds or, in fact, any response to its demand.

The Guarantee has now received information that Texas Descon failed to properly apply contract payments to its subcontractors and material suppliers on the referenced projects. In the Security to Surety section, the General Agreement of Indemnity ("GAI"), dated June 6, 2014, states that the Indemnitors:

4. Agree that with respect to each specific contract secured by Bond executed, provided or procured by Surety on Principal's behalf, all money and property representing the consideration for the performance of the contract, (including, without limitation, the proceeds of claims for adjustments, additional compensation, compensation for the delay, extra work, change orders, insurance claims and all damage claims) whether in the possession of the Principal, Indemnitors or others and whether earned, unearned, paid, retained or to be paid shall be held in trust as trust funds for and shall be used solely for:
 - a. the performance of the contract;
 - b. the payment of obligations to subcontractors, laborers, and suppliers of materials and services incurred or to be incurred in the performance of the contract for which Surety is or may be liable under Bonds and;
 - c. the satisfaction of Indemnitors' obligations to Surety under this Agreement and all other indebtedness and liabilities of Indemnitors to Surety.

One Towne Square, Suite 1470, Southfield, Michigan, USA 48076 | Tel: 248.281.0281 1.866.328.0567 | Fax: 248.750.0431

Excellence, Expertise, Experience ... Every time | theguaranteeus.com

Indemnitors
July 24, 2015
Page 2 of 2

Additionally, the Texas Construction Trust Fund Act, TX Prop. Code Sec 162, creates a trust obligation with respect to contract funds received from an owner. Further, the failure to properly apply funds received from owners creates liability under the Texas Prompt Payment Act, TX Govt. Code Sec. 2251.

Texas Descon's failure to pay its subcontractors and material suppliers upon receipt of funds from the project owners creates both a breach of the GAI and a violation, possibly personally by Mr. Smith, of the Texas Construction Trust Fund and Texas Prompt Payment acts. The failure to make proper and prompt payment has also placed the completion of the bonded projects in jeopardy. The Guarantee has received notice from both owners that progress has slowed or stopped on the projects due to the unwillingness of subcontractors to continue work without payment.

The purpose of this letter is to put Texas Descon, L.P, Descon 4S, LLC, and Michael D. Smith (the "Indemnitors") on formal notice that The Guarantee will begin taking steps necessary to mitigate its potential losses on the bonded projects. Those steps may include the use of the Power of Attorney provision in the GAI to voluntarily default Texas Descon and facilitate completion.

This correspondence and all prior or subsequent communications are made with the express reservation of all rights and defenses that may be available to The Guarantee, at law or in equity, under the terms and provisions of the GAI.

Should you have any questions, please feel free to contact me at (248) 281-0281 x66024 or jjubera@gcna.com.

Sincerely,

Guarantee Company of North American USA



Jeffrey S. Juber
Vice President – Claims & General Counsel

cc: Gregory Weinstein, Weinstein Radcliff Pipkin LLP (via email only)
Stephanie O'Rourke, Cokinos Bosien & Young (via email only)



AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

The Guarantee Company of North America USA

Plaintiff(s)

V.

Texas Descon, L.P., Descon 4S LLC,
and Michael D. Smith

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Texas Descon, L.P.
c/o Michael D. Smith
5006 W. Chapin Road
Edinburg, Texas 78451

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Gregory M. Weinstein

Gregory M. Weinstein
Weinstein Radcliff Pipkin LLP
6688 N. Central Expressway, Suite 675
Dallas, Texas 75206
214-865-6125; Fax: 214-865-6140
gweinstein@weinrad.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: